**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | CC Docket No. 95-116 |
| Telephone Number Portability | ) | RM 8535 |
| Cost Classification Proceeding | ) | |

## REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115(d) of the Commission's rules, Cincinnati Bell Telephone Company ("CBT") hereby replies to AT&T Corp.'s January 28, 1999 Opposition to Applications for Review ("AT&T's Opposition") of the December 14, 1998 Memorandum Opinion and Order of the Common Carrier Bureau, DA 98-2534 ("Bureau Order").

Contrary to the assertions raised in AT&T's Opposition, the Bureau Order unlawfully prevents incumbent LECs from recovering certain network upgrade costs through LNP charges even when the costs would not have been incurred by the incumbent LECs but for the regulatory mandate to implement LNP. Moreover, the Bureau's Order clearly departs from the policies established by the Commission in its May 12, 1998 Third Report and Order in this proceeding. As demonstrated herein, the arguments raised in AT&T's Opposition are without merit. Accordingly, the Commission should promptly grant CBT's Application for Review and correct the defects in the Bureau Order so that CBT is afforded a reasonable opportunity to recover the costs caused by compliance with the LNP mandate in a competitively neutral manner.

## I. THE BUREAU UNLAWFULLY EXERCISED ITS DELEGATED AUTHORITY AND DECIDED A SUBSTANTIVE POLICY CHANGE BY ADOPTING COST RECOVERY RULES THAT DIRECTLY CONFLICT WITH THE COMMISSION'S INSTRUCTIONS.

In its Opposition, AT&T claims that the Bureau did not exceed its delegated authority in promulgating the second prong of the test to determine whether a cost is eligible for LNP cost recovery pursuant to the rules established in the Commission's Third Report and Order.[1] In support of this claim, AT&T cites certain language from the Third Report and Order that AT&T believes supports the Bureau's erroneous interpretation and unlawful action in this proceeding.

For example, AT&T cites paragraph 72 of the Bureau Order which, taken out of context, might lead one to believe the Bureau's interpretation was correct. Similarly, AT&T cites only a portion of paragraph 73. However, when the cited language is read in conjunction with paragraph 73 in its entirety, a different picture emerges. The second half of paragraph 73 elaborates upon and explains the types of costs that are recoverable. A full reading of paragraph 73 indicates that the Commission did not envision the Bureau's restrictive definition of "costs directly related to providing portability." Indeed, the second half of paragraph 73, which CBT cited in its Application for Review, suggests that the Commission intended for carriers to recover LNP costs other than those directly involved in porting a number. Particularly relevant here are the last two sentences of paragraph 73, which indicate that the intent was to allow recovery of costs that would not otherwise have been incurred to provide telecommunications service and which do not enhance a carrier's services generally.

> "Apportioning costs in this way will further the goals of section 251(e)(2) by recognizing that providing number portability will cause some carriers, including small and rural LECs, to incur costs that they would not ordinarily have incurred in providing telecommunications service. At the same time, this approach recognizes that some upgrades will enhance carriers' services generally, and that

[1] AT&T Opposition at p. 2.

> at least some portion of such upgrade costs are not directly related to providing number portability."[2]

Thus, for example, the OSS upgrades that CBT was required to implement in order to keep its systems operating at the same level as before LNP fall within this category of recoverable LNP costs. These are costs that CBT would not ordinarily have incurred in providing telecommunications service, and the upgrades will not enhance CBT's services generally.

The last sentence of paragraph 68 suggests once again that only the benefits unrelated to LNP are to be disallowed, not the entire cost of an upgrade undertaken to implement the LNP mandate.

> "The division between carrier-specific costs directly related to providing number portability and carrier-specific costs not directly related to providing number portability recognizes that some components of the costs carriers will incur will provide carriers with benefits unrelated to number portability."[3]

When the Third Report and Order is read in its entirety, the Bureau's interpretation can not be supported. In short, the language cited by AT&T in no way cures the obvious legal defects in the Bureau Order.

[2] Third Report and Order, ¶ 73.
[3] Third Report and Order, ¶ 68.

## II. THE BUREAU'S ACTION IS FURTHER UNLAWFUL BECAUSE IT FORCES LECS TO RECOVER THE COSTS OF LNP FROM OTHER SERVICES OR TO ABSORB THE COSTS AS A "COST OF DOING BUSINESS."

In its Opposition, AT&T also misconstrues CBT's argument relative to the impact of the Bureau Order on LEC cost recovery. AT&T argues that the Bureau Order did not require carriers to recover LNP costs via access charges or other prohibited means.[4] AT&T obviously misunderstands CBT's argument. In its Application for Review, CBT pointed out that the only federal mechanisms available to LECs are interstate access charges and end user charges, and that recovery of LNP costs through access charges was expressly prohibited by the Commission.[5] Thus, by precluding LECs from recovering all LNP costs through end user charges, the Bureau's decision effectively leaves these costs either unrecovered, or recoverable only through state rates. As stated in CBT's Application for Review,[6] both results are unlawful.

The Bureau further suggested that these costs were to be treated as general network upgrades and should be absorbed as a cost of doing business. However, as CBT argued in its Application for Review,[7] that conclusion violates several other cost recovery restrictions: 1) to the extent that incumbent LECs incur network upgrade costs with no means of recovering those costs, the ILEC will be competitively disadvantaged and the cost recovery would not be competitively neutral as required by § 251(e)(2) of the Telecommunications Act of 1996; 2) to the extent the Bureau expects incumbent LECs to recover these costs in their intrastate rate bases, it violates the proscription against federal involvement in state ratemaking (see Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986); Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir 1997), cert. granted sub nom. AT&T v. Iowa Utilities Board, 118 S.Ct. 879 (1998));

[4] AT&T Opposition at p. 7.
[5] CBT Application for Review at p. 7.
[6] Id.

and 3) to the extent LECs are expected to go without any means of cost recovery, it violates the Fifth Amendment proscription against taking of property without adequate compensation (see Duquesne Light Co. v. Barasch, 48 U.S. 299 (1989)). In any event, Congress did not authorize the Commission (and certainly not the Bureau) to take LEC property in § 251(e)(2). See Bell Atlantic Tel. Co. v. FCC, 24 F.2d 1441 (D.C. Cir. 1994).

## CONCLUSION

For the foregoing reasons, the Commission should ignore AT&T's Opposition and vacate the action of the Common Carrier Bureau with respect to establishing policies for the recovery of joint costs of providing LNP. CBT also urges the Commission to expedite consideration of its Application for Review. While the Application is pending, CBT and other LECs will be prevented from recovering their appropriate LNP costs. As the Commission has limited the time period in which certain LNP costs may be recovered, any delay in deciding this matter will cause LNP rates for the balance of the recovery period to increase. Such an increase would be detrimental to competitive neutrality and disadvantage LECs. Therefore, it is in the public interest for the Commission to expedite its ruling and permit LECs to recover their full LNP costs as soon as possible.

Respectfully submitted,

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[7] Id.